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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.————

RICHARD FRANKLIN BIRD,
Petitioner,

v.

SARAH ELLEN BIRD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW, STATE OF MICHIGAN

To the Honorale Chief Justice and the Associate Justices of the Supreme Court of the United States.

Petitioner, Richard Franklin Bird, prays that a writ of certiorari be issued to review the final order of the Circuit

Court for the County of Washtenaw in the State of Michigan denying Writ of Habeas Corpus, entered in the above entitled case January 6, 1955. Citations to Opinions Delivered in the Courts Below:

> Preliminary opinion delivered in the course of trial holding that the writ " should be denied.", (R R 10-12) and is printed in Appendix B hereto, *infra* pp 28-35.
>
> Final opinion delivered upon final order denying the writ (R 52-56) and is printed in Appendix B hereto, *infra* pp 36-40.

The Supreme Court of the State of Michigan denied petitioner's application for leave to appeal without delivering an opinion.

JURISDICTION

The final order of the trial court (Circuit Court, Washtenaw County, Michigan) was entered January 6, 1955 (R 17, *infra* 41). The Supreme Court of the State of Michigan entered its final order October 11, 1955, denying petitioner's application for leave to appeal in the nature of certiorari (R 66, *infra* 43). Jurisdiction of this Court is invoked under *Title* 28, *United States Code, Section* 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By Writ of Certiorari . . . where any title, right, privilege or immunity is specifically set up or claimed under the Constitution."

The Supreme Court of the State of Michigan is the highest court of the State. The trial court's order sought to be reviewed became final within the meaning of *Title* 28, *United States Code, Section* 1257[1] by the order of the Supreme Court of the State of Michigan ,entered October 11, 1955, denying petitioner's application for leave to appeal in the nature of certiorari (R 66, *infra* 43).

Under the rules of practice and court decisions of the State of Michigan, application for leave to appeal is required in seeking review in habeas corpus cases. *Michigan Court Rule* 60, *Section* 1 (*Mich. Ct. R Anno., Honigman, p.* 594) (Appendix A, *infra* 27) reads in part:

> "Leave to appeal to the Supreme Court shall be required in the following cases:
>
> (b) Where the remedy for review under the Statute, or in the absence of statute, under the common law is by certiorari."

Remedy for review in habeas corpus cases is not provided by any statute of the State of Michigan. Decisions of the Supreme Court of the State of Michigan have held that review of habeas corpus cases is by application for leave to appeal in the nature of certiorari *Liebert v. Derse,* 309 Mich. 495, 15 NW (2d) 720, *Bird* v. *Bird,* 308 Mich. 230, 13 NW (2d) 272.

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[1]Andrews v. Va. RR Co., 248 U.S. 272, 63 L ed 236.

HOW THE FEDERAL QUESTION IS PRESENTED

The Federal question was timely raised and considered.

The petition for writ of habeas corpus in the Michigan trial court pleaded that the father-petitioner is lawfully entitled to the custody of his children by virtue of a valid order of the California court of competent jurisdiction to which the Michigan court should give full faith and credit under the laws of this state and the United States of America (R 3, para. 13, *infra* 51).

Petitioner's application to the Supreme Court of the State of Michigan for leave to appeal (R 40) set forth in part:

> "2. That the said Richard Franklin Bird, desires to appeal from said order, and his reasons and grounds for such appeal are as follows:
>
> (a) The Circuit Court, by its order, failed, neglected and refused to give full faith and credit to the judicial proceedings of the courts of the State of California as required by Article IV, Section 1 of the Constitution of the United States."

The Supreme Court of the State of Michigan refused to exercise its discretionary power to review the Federal question by its order of October 11, 1955, (R 66) denying the application for leave to appeal. No opinion was rendered.

The trial court passed upon the Federal question by its order of January 6, 1955, denying the writ of heabeas cor-

pus (R 17, *infra* 41), rendering its opinion January 4, 1955, (R 52-56, *infra* 36) confirming its prior preliminary opinion (R 10-12, *infra* 28), saying: (R 11, *infra* 32):

> "The court has carefully considered the extensive briefs of the parties and especially the claim of petitioner that full faith and credit must be accorded by the Michigan court to the order of October 25, 1951 (R Ex. A, 95-97, *infra* 45) of the California court.
>
> The true Michigan rule appears to be that stated in Ex Parte Peddicord 269 Mich. 142" (256 NW 833). (Also, cited with approval, In re Stockman, 71 Mich. 180, 38 NW 876, In re Leu, 240 Mich, 240, 215 NW 384, In re Volk, 254 Mich. 25, 235 NW 854.)

The trial court held that:

> ". . . the Peddicord case is controlling herein." (R 11, infra 32), and that the order of the California court "does not constitute a judgment which must be given full faith and credit under the provision in the Federal Constitution." (R 12, infra 34.)

QUESTION PRESENTED

The question presented is:

> Whether in habeas corpus proceedings attacking the right of a mother to retain possession of her minor children, a Michigan court, by virtue of Article IV, Section 1, United States Constitution, must give full faith and credit to an unimpeachable California divorce decree of complete and competent jurisdiction awarding the children's custody to the father.

THE CONSTITUTIONAL PROVISION INVOLVED

Article IV, Section 1, *U.S. Constitution*:

> "Full faith and credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof." (Appendix A, infra 26.)

The general law of the Congress is 28 *USCA* 687, which reads in part:

> Judgments "Shall have such faith and credit given to them in every court within the United States as they have by laws and usage in the courts of the State from which they are taken." (Appendix A, infra p. 26.)

STATEMENT

The parties, Mr. and Mrs. Bird, were married in 1937, and several months later established their permanent domicile in California. Their three children, now living, were born there: Richard Nixon Bird, born September 23, 1938, Ellen Anne Bird, born September 21, 1941, and Mary Elizabeth Bird, born July 16, 1943. In March, 1946, Mrs. Bird commenced divorce proceedings in the Superior Court of the State of California, County of Los Angeles (R Ex. A,

1). Throughout the proceedings both parties appeared in the case in person and by their attorneys, and the entire family was domiciled and physically present in California. She obtained the decree of divorce December 16, 1946 (R Ex. A 57-71) awarding her custody of the children, subject to the father's right of their reasonable visitation. The decree further provided that the mother

> "... shall not remove any of the children from the State of California for a period of over ninety (90) days without first obtaining approval of the court or the written consent of the defendant (father) for any such removal." (R Ex. A, p. 58.)

In 1950 each of the parties filed petitions in the California court seeking modifications of the judgment (R Ex. A, p. 77-78, Ex. A, p. 84-85). Mr. Bird sought more extensive right of visitation of the children. Mrs. Bird sought permission to permanently remove the children to the State of Michigan and establish her home there. She gave as her reasons, that she had a teacher's certificate in Michigan and that she desired to return to teaching in Michigan where she could better support herself and give the children a musical education and other cultural benefits, and establish her own security (R Ex. A, p. 85). August 8, 1950, the California court entered its order (R Ex. A, p. 88) denying her right to permanently remove the children from California and granted Mr. Bird more extensive right of visitation of the children.

Immediately thereafter Mrs. Bird formulated her intent to permanently remove the children to Michigan (R T 139). May 1, 1951, she permanently removed the children to Mich-

igan, deceiving Mr. Bird, who believed she intended to return with the children within 90 days (R T p. 43-44, R T 141).

July 11, 1951, Mr. Bird learned that the mother did not intend to return with the children (R Ex. A, 91A, 91B, R T 142). Four days later he contacted his attorney (R T 210) who July 27, 1951, filed Mr. Bird's petition in the California court (R Ex. A, 89-92) seeking modification of the divorce judgment to award the children's custody to the father. Mrs. Bird's attorney appeared and represented her at the hearing on the petition (R Ex. A, 94, R T 144). October 25, 1951, the California court entered its order (R Ex. A, 95-97, Appendix C, *infra* 46), making findings of fact of the mother's violations of the judgment and that

> "it is for the best interest of said minor children, and each of them, that they be returned to the State of California and that defendant (father) be given the sole care, custody and control of said minor children."

Further, the order modified the prior judgment by awarding the father custody of the children with reasonable visitation on the part of the mother.

During November, 1951, a copy of the same order was personally served upon the mother in Michigan by a Washtenaw County Sheriff's Officer (R T 144).

September 30, 1952, the father commenced habeas corpus proceedings in the Circuit Court for Washtenaw County, Michigan, attacking the mother's right to retain possession of the children (R 2, *infra* 47). His claim to the children's custody was based on the full faith and credit provisions

of the *United States Constitution* (*Article IV, Section* 1), (R 3, para. 13, *infra* 51) seeking enforcement of the California judgment of October 25, 1951, (R Ex. A, 95-97, *infra* 45) awarding him custody of the children. The mother's responsive pleadings (R 6, *infra* 52) did not allege subsequent change in circumstances affecting the children's welfare. Her pleadings admitted (R 2, para. 4, R 6, para. 4, *infra* 48, 53) that in the California divorce proceedings both parties personally appeared; that throughout the course of divorce proceedings they and the children were domiciled in, and physically present in California, and subject to the jurisdiction of that court (R 2, para. 3, *infra* 48 R 3, para. 7, *infra* 49 R 6, para. 3, 8, *infra* 53); that at all times the children were domiciled in the State of California (R 2, para. 3, *infra* 48 R 6, para. 3, *infra* 53); that the California court order of October 25, 1951, (R Ex. A, 95-97) awarding the children's custody to the father, should not be given full faith and credit in the Michigan court (R 7, para. 13, *infra* 55); that she violated the California decree prohibiting her from permanently removing the children from California (R 6, para. 9, *infra* 54); that her reason was to prevent the father's right of visitation of the children (R 6, para. 8, *infra* 53); that her attempts to bring such matters to the attention of the California court were prevented for reason that Mr. Bird was a member of the California Bar (R 6, para. 9, *infra* 54 R T 153).

Upon trial in the Michigan court a properly authorized copy of the records in the California court proceedings was received in evidence (R T 9, R Ex. A, 1-99). Mrs. Bird did not challenge the California court's jurisdiction to enter the order of October 25, 1951, (R Ex. A, 95-97, *infra* 45). She testified that her California attorney, with her authori-

zation, appeared in her behalf in those proceedings changing custody to the father (R T 144).

The trial court did not find laches of the father (R 55, *infra* 40).

The trial court found that during the period from the time the father learned of the mother's intent to remain in Michigan until entry of the California court's order awarding him custody (July 11, 1951, to October 25, 1951) the mother and the children acquired a Michigan domicile, and "thereafter the order of the California court in no way affected the children's status and does not constitute a judgment which must be given full faith and credit under the provisions of the Federal Constitution." (R 12, *infra* 34.)

The trial court further found "the apparent well-being of the children after the change in circumstances, which has taken place since the children left California, and especially since the entry of the order of October 25, 1951, in the California court" (R 55, *infra* 39). By order of January 6, 1955, the trial court denied the writ of habeas corpus (R 17, *infra* 41).[2]

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[2]Petitioner believes the following is not material to the Federal question presented for review. However, the record refers to these matters: (a) The mother's responsive pleadings in the Michigan court charged the father with perverted sexual activities with the children (R 6, para. 9, *infra* 54). Upon trial, the mother claimed (R T 83-85) all the alleged acts occurred prior to the California order of October 25, 1951, awarding custody to the father. She testified that prior to the Michigan proceeding, she had never called such matters to the attention of any court, nor to Mr. Bird (R T 153-158, R T 46). The trial court found there was no evidence to support the allegation (R 55). (b) Petitioner is an attorney at law and for the past 25 years and more has been Deputy Public Defender of Los Angeles County, California, practicing before the Superior Court of that County. He is not licensed to practice law in the State of Michigan (R 40).

Leave to appeal the trial court's order to the Supreme Court of the State of Michigan was denied by order entered October 11, 1955, *supra* p. 4, *infra* 43.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The Federal Question Presented Has Not Been Determined By The United States Supreme Court (*Supreme Court Rule* 19a)

May v. *Anderson* (1953) 345 U.S. 528, 97 L ed 1221, 73 S Ct. 840, by a divided court, is the only decision of this court passing upon the full faith and credit aspects of a decree fixing custody of a minor child in connection with a divorce of the parents.[3] The opinions turned on the point, absent in the case at bar, that the Wisconsin decree of divorce and custody was obtained in an *ex parte* proceeding. The mother had removed with the children to Ohio, prior to the father's commencement of divorce proceedings. In the case at bar the jurisdiction of the California proceedings is not challenged. One significant point in common is that the door is closed in both cases to modifying the prior award of custody on a showing of changed circum-

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[3]Note 97 L ed 1232.

6 *ALA Law R.* (1953) 88, 93, noted that the *May* case did not expressly pass upon the extent of full faith and credit to be given "a foreign decree of a court of competent jurisdiction."

stances.[4] Of further significance, in this case the mother's responsive pleadings in the Michigan court admitted the children's California domicile (R 2, para. 3-4, *infra* 48 R 3, para. 7, *infra* 49 R 6 para. 2, 4, 7, *infra* 52). The case at bar does present the "special considerations" that arise where a parent leaves a state for the purpose of evading jurisdiction and surreptitously removes the children from their State of domicile. In the *May* case this court expressly noted the absence there of such "special considerations."[5]

The narrow issue was not before this court in the *May* case, nor any other case. "The Supreme Court has never squarely decided whether a foreign custody decree is entitled to full faith and credit under the Constitution, and the present case (*May* v. *Anderson, supra*) leaves the question still unresolved".[6] This Court expressly reserved decision of the question in *Halvey* v. *Halvey* (1946) 330 U.S.

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[4]In the *May* case, "Under Ohio procedure that writ (habeas corpus) tests only the immediate right to possession of the children. It does not open the door for modification of any prior award of custody on a showing of changed circumstances." (97 L ed 1226). In the case at bar the mother's responsive pleading in the Michigan court did not allege changed circumstances but, rather, cirmumstances alleged to have existed prior to the California court's order of October 25, 1951, (R 95-97, *infra* 45) awarding custody to the father (R 6-7, *infra* 53 R T 98-99).

[5]*May* v. *Anderson, supra,* at 97 L ed, 1227, N 8.

[6]52 Mich. L.R. 594 (1954) at 594.

601, 91 L ed 1133, 67 S Ct. 903.[7] The *Halvey* and *May* cases did not present this Federal question because of the *ex parte* nature of the foreign decrees there involved. The instant case squarely presents the reserved *Halvey* questions that were not answered in the *May* case. Those questions now may be resolved by decision of the single question presented:

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[7] *Halvey* v. *Halvey, supra,* at 1136 L ed, expressly reserved decision on four questions of full faith and credit. Later, the *May* case, supra, answered two. Still unanswered are:

1. "Whether Florida at the time of the original decree had jurisdiction over the child, the father having removed him from the State after the proceedings started but before the decree was entered."
2. "Whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such rules concerning custody as the welfare of the child from time to time requires."

Prior to the *May* case (1953) Prof. Ehrenzweig commented (51 Mich. L.R. 345, 356), "The Supreme Court of the United States, in the only case (Halvey) dealing with this problem, has signally failed to decide the issue (basis of recognition of foreign custody awards). In fact, majority opinion and dissent reflect the Court's division on this point."

Since the *May* case, 14 *La. L.R.* 683, 684 (1954) commented on the yet unanswered questions of the *Halvey* case, that "if answered, might go a long way toward clearing up the present dissention as to what constitutes the jurisdictional basis of a custody decree which must be recognized by sister states."

Univ. Ill. Law F. 644, 647 (1953) speaking of *May* v. *Anderson,* "Because of the disagreement within the court, the significance of this decision is not apparent . . ."

20 *Brooklyn Law R,* 110, 113 (1954), "Would it not be conservative to point out that it took about half a century to settle the main problems as between the spouses in migratory divorces, and that it may require an equivalent period and quantity of cases to have the same clarity in custody problems."

52 *Mich. Law R,* 594 (1953) at page 596, ". . . the reasoning of the court (*May* v. *Anderson*) is unlikely to lessen the confusion in a field sorely in need of clarification."

"May a state effectively retain its complete and unimpeachable jurisdiction[8] over childrens custody?"

II. Importance of The Federal Question Presented

This prolific subject of litigation[9] has produced a mass of squarely conflicting decisions between the appellate

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[8]Complete and unimpeachable jurisdiction of the California court in the instant case: Unlike the *ex parte Halvey* and *May* cases, the California court had both *in personam* and *in rem* jurisdiction. Both parents and children were domiciled and physically present in California (R 2, para. 3-4, *infra* 48 R 3, para. 7, *infra* 49 R 6 para. 3, 4, 7, *infra* 53). Both parents appeared in person and by their attorneys throughout the California divorce proceedings (R Ex. A). The decree retained the children's California domicile by restricting their removal from the State. (R 2, para. 5, *infra* 48). The family still physically present in California, the mother's petition there to remove to Michigan, was denied, (R Ex. A 88) and was unappealed. The mother then unlawfully removed the children to Michigan (R 3, para. 9, *infra* 50 R 6, para. 9, *infra* 54) deceiving the father (R T 43-44, R T 141), and claiming *"the California courts would not give* (her) *justice . . ."* and that her *"judgment was superior to that of the judicial system of California."* (R T 153). California domicile of the children was admitted in the Michigan proceeding. (R 2, para. 3, *infra* 48 R 6, para. 3, *infra* 53). While mother and children were in Michigan, the California court modified the decree, awarding custody to the father (R Ex. A 95-97, Appendix C, *infra* 45), the mother appearing by her attorney (R Ex. A, 94, R T 144). Validity of the modified decree is not denied (R 3, para. 10, *infra* 50 R 6, para. 10, *infra* 54) and was unchallenged in the Michigan hearing (R T p. 1-229). No subsequent "change in circumstances" is pleaded (R 6-7, *infra* 52-55). No laches of the father (R 55, *infra* 40).

Quere, mere physical presence of children (police power) in Michigan sufficient jurisdiction?

[9]*Social and Statistical Analysis,* 10 *Law & Contem Prob* 700 (1944); 6 *ALA L.R.* 88, 89 (1954).

"Due to the peculiar 'small family' social structure that has developed in the U.S., the rising divorce rate, and the extreme mobility of the population, problems relating to the judicial disposition of the custody of a child of divorced parents have been intensified."

courts of the States.[10] Although purely a federal question of law, only the State courts have passed upon it, without the essential guidance of this court.[11] Only the United States Supreme Court can resolve these conflicts. Decision in this case will "secure the national rights & uniformity of Judgments"[12] of wide and immediate importance far beyond the particular facts and parties involved in this action.

"The claim of children as well as the home-keeping parent to have their status determined with reasonable certainty, and to be free from an incessant tug of war between squabbling parents is" urgent.[13] The present uncertain state of the law rewards parental abduction of

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[10]52 *Mich. Law R.* 594 at p. 594 (1954) "The division within the Supreme Court (*May* v. *Anderson, supra*) is mirrored in the state decisions and textual writers."

51*Mich. Law R* 345 (1953) *Interstate Recognition of Custody Decrees, Law and Reason* v. *The Restatement, Ehrenzweig.*

Rabel, The Conflict of Laws, a Comparative Study, p. 531 (1945 "American courts disagree greatly on the conditions under which a court has jurisdiction in divorce proceedings to settle a dispute concerning custody of the children." "Every court in the United States applied its own municipal law . . ."

9 *ALR* (2d) 434 *Custody Award—Child Outside Of State.* At p. 439, "There is little accord among the authorities as to the proper basis of jurisdiction to award custody of a minor child, and the cases dealing with this question are in considerable confusion."

[11]See note 7, *supra.*

[12]Chief Justice Vinson quoting John Rutlege of S.C., Constitutional Convention, *Sup. Ct. Practice, Stern-Gressman (Rev. Ed.)* p. 107.

[13]Justice Jackson, *May* v. *Anderson, supra* at p. 1231 (L ed).

children. Self-help is the ultimate authority, because the parent who flees the sheriff may shop among the courts for a favorable forum.

In spite of the fact that sociologists, judges and legal writers long have generally recognized the welfare of the child as the primary consideration, national disunity in the law has served to promote successive custody litigation.[14] Our mobile population requires a test that will resolve jurisdictional disputes. The welfare of children and parents alike will be better achieved by a settled law that deters the contemptous self-help remedies of parents. The child welfare problems, inherent in migratory divorce, require a rule that repels the evil at its source—the would-be abducting parent. In no other field of law has the concept of enforcement so yielded to a wrong. Uncertainty of the law invites its disobedience. Disobedience is wrong chiefly because it is inflicted upon the child's welfare, and secondarily upon the obedient parent. It is submitted that the present state of the law promotes future evils against countless children and thus commands searching scrutiny in this case.

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[14]*Crowell* v. *Crowell,* 184 Oreg. 467, 198 P (2d) 992 (1948) where the Oregon court was compelled to choose between the enforcement of 5 foreign decrees between the issuance of which the child had been kidnapped twice by the father and three times by the mother.
51 *Mich. Law R.* 372.

III. Conflicting Decicions of the Highest State Courts on this Federal Question

For brevity we refer to the works of legal writers summarizing the pertinent authorities.

In 1945 Prof. Stansbury examined more than sixty cases and found that in a substantial majority of cases, recognition for foreign custody decrees was refused.[15] In 1953 Prof. Ehrenzweig examined over one hundred custody cases, since decided, and confirmed the Stansbury findings.[16] One half of the cases refusing recognition of the foreign decree asserted jurisdictional defects in that decree in "legalistic" support of other considerations. The *"res"* or *status* ideology of *"Restatement"*[17] and Judge Goodrich's text[18] has "lost ground" Ehrenzweig asserted. Citing numerous authorities, he discussed a variety of conflicting concepts of jurisdiction adopted by

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[15]*Stansbury, "Custody and Maintenance Across State Lines"*, 10, *Law and Contem Prob* 819 *at* 828 (1944).

[16]*Ehrenzweig, "Inerstate Recognition of Custody Decrees"* 51 *Mich. Law R.* p. 345 at 348.

[17]*Restatement in the Courts* 256 (*perm Ed* 1945) 1948 *Supplement* 146 (1949).

[18]*Goodrich, Conflict of Laws,* (3 *ed*), 421 (1949), also, *Goodrich "Custdoy of Children in Divorce Suits—The Conflict of Laws Problem" 7 Cornell Law Q* 1 (1921), discusses case virtually identical to case at bar and concludes that "a decree purporting to be more than a temporary police measure should not be made otherwise that at the domicile." *Griffin* v. *Griffin,* 95 Oreg. 78.

the State courts, including *"multistate jurisdiction"*,[19] *"The Kansas Rule"*,[20] *"Clean Hands,* [21] *"The California Rule"*[22], *and "The Washington Rule"*[23]. The Tenth Circuit appears to strongly support the rule of enforcement of foreign custody decrees.[24] Ehrenzweig concludes that the trend of authority that does favor enforcement of foreign custody decrees, does so for varied reasons that are not necessarily on Constitutional grounds.

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[19]*"Multistate Jurisdiction"* an abandonment of any jurisdictional test. Determine custody without regard to prior determination by a court of a sister state.

[20]*"Kansas Rule"*, an independent investigation of child's welfare. Former adjudication by court of a sister state binds the parents but not the child. State has relation of *parens patriae* to child. No pretense of recognizing foreign decrees either by full faith and credit or by comity.

[21]*"Clean Hands"*, spouse seeks second court's jurisdiction in bad faith, a strong factor in compelling recognition of sister state decree. NOTE: This factor recognized in *May* v. *Anderson*, 97 L ed at p 1227, N 8. (See N 35, *infra* 23.)

[22]*"California Rule"*, recognize foreign decree by comity in absence of changed circumstances.

[23]*"Washington Rule"*, consistently has given full faith and credit to foreign decree. Parent cannot acquire a new domicile for child in disobedience of foreign court order.

ages for removal of child from a sister state contrary to custody order.

[24]*Crocker* v. *Crocker* (10 Cir. 1952) 195 F (2d) 236 award of dam-

The basic conflict arises from two opposed concepts of jurisdiction,[25] *"Status"* based on domicile of the child," and *"parens patriae"* (Michigan Rule[26]) based on the child's residence. The additional factor of *in personam* jurisdiction over both parents was required in *May* v *Anderson, supra,* and has elicited much comment from the legal writers.[27]

Within these conflicting concepts, the confusion is compounded by verbalism. "A finding of changed conditions is one easily made when a court is so inclined, the highest court of Connecticut has said. It is rarely more than a manner of speech supporting a preconceived result."[28] Even

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[25]*"Custody of Child—Jurisdiction,* 4 *ALR* (2d) 7; *Boston U.L.R.* 516 (1953) notes that some courts require mere physical presence of the child, others mere physical presence of both parents. See 26 *R Mt. L.R.* 205, (1954).

[26]Discussed, *supra,* "How the Federal Question is Presented"—Trial court's opinion, (R 49-51, *infra* 28).

[27]6 *Ala L. Rev.* 88, 33 *BUL* 516, 20 *Brooklyn LR* 110, 22 *Fordham L.R.* 299, 14 *La. L.R.* 683, 52 *Mich. L.R.* 594, 38 *Minn. L.R.* 273, 33 *Neb. L.R.* 100, 26 *Rock Mt. L.R.* 205, 28 *St. Johns L.R.* 118, 1953 *U. Ill. L.F.* 644, 102 *U. Pa. L.R.* 668, 15 *U. Pitt. L.R.* 163. 42 *Geo. L.J.* 126 (1953) at 128, Discussing *May* v. *Anderson,*" ". . . The court has departed from the traditional view that jurisdiction to grant custody . . . rests on the domicile of the moving party and that of the child. Instead, the majority has raised a new standard, that of personal jurisdiction over the parent . . . the majority, therefore, has greatly altered the law in custody awards . . . the ruling moves away from the traditional view that the interest of the child is paramount . . . the future of the child seems based on the agility and cleverness of a father and mother to abduct them . . ."

[28]51 *Mich. L.R.* 345 at 352.

the rule of *res judicate,* at times, has been discarded to permit evidence of circumstances existing prior to the foreign decree.[29] The established meaning of a child's *domicile* has been distorted to mean *residence* or mere *physical presence.* It may, or may not, depend on a parent's domicile, or whether it is contrived, or in violation of a court's decree, or other circumstances.[30]

For a century[31] American judges and legal writers have struggled to agree upon the principles that best protect children's welfare and parental rights, in extraterritorial custody matters. Rather, the most fundamental differences have increased. Is it *in rem* jurisdiction to determine a status, or *in personam* jurisdiction to adjudicate personal claims, or is it police power to regulate the safety of all within a State's boundary? We do observe general agreement of these legal writers on one point—the vast and increasing number of migratory divorces urgently requires national unity in this law. (See N 27, *supra* 19.)

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[29] 99 *A.L.R.* (2*d*) 623; *Goodrich, Conflict of Laws* (3 *ed*) 421, 423 "as such a finding is one which can be easily made and plausibly supported, it follows that the recognition extraterritorily which custody orders receive or can command is liable to be more theoretical than of great practical consequence."

[30] 13 *A.L.R.* (2*d*) 306; *Goodrich,* 7 *Cornell L.Q.* 1 (1921); 27 *Tulane L.R.* 361 (1953).

[31] 51 *Mich. L.R.* 345 *at* 345.

IV. The Lower Court's Decision

The lower court's decision (R 49-56, *infra* 28-40), is believed to be erroneous, conflicting in principle with both the majority and minority expressions of this Court in *May* v. *Anderson, supra.* Moreover, it is believed that the rule adopted by the lower court promotes national disunity, defeating the avowed aim of serving the children's welfare. While inflicting grave injustice on the home-keeping parent, it reduces the law to the ultimate authority of self-help.

(a) Conflict With The Principles Expressed in *May* v. *Anderson, supra.*

Clearly, the *May* case is distinguished from the instant one, turning on the differing and fundamental fact that the prior custody decree was obtained by *ex parte* divorce proceedings. The principle of the majority opinion is that, in custody proceedings *in personam* jurisdiction over both parents is essential. The principle of the minority opinion by Justic Jackson (Justice Reed concurring) is that domicile of the child plus one parent satisfies jurisdictional requirements. The principle expressed in both minority opinions is that the issue must be framed in the pleadings.

The instant case meets both jurisdictional tests. The trial court's finding that the children were domiciled in Michigan (R 12, *infra* 33) squarely contradicts the pleaded admission of their California domicile (R 2, para. 3, *infra* 48 R 3, para. 7, *infra* 49 R 6, para. 3, 7 *infra* 53). Beyond

transgressing the pleadings, it holds that in virtually no circumstance may a sister state retain its once perfect jurisdiction over children's custody.

The instant case directly challenges the legal extremity of the panacean phrase "changed conditions." Although unpleaded (R 6-7, *infra* 52-55), the trial court made such a finding (R 11, *infra* 31). It is believed that such issue is as absent here as in the *May* case, where the Ohio procedure did not "open the door . . . to a showing of changed circumstances."[32]

The decision in *May* v. *Anderson, supra,* without elaboration, noted that the important element of bad faith of the leave-taking parent was absent in that case.[33] It is believed that this court is in accord with the principle that in the

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[32]It is believed that national disunity on the extraterritorial effect of custody decrees cannot be resolved until the United States Supreme Court defines the limitations and proper application of the jargon *changed circumstances.*

Legal writers and judges have long acknowledged that "it is rarely more than a manner of speech supporting a preconceived result." 51 *Mich. L.R.* 345 *at* 352.

1953 *U. Ill. L.R.* 644, 648 "If some sort of a uniform concept of what should constitute a change in circumstances would be laid down by the Court (U.S. Supreme Court), jurisdiction in the state of the domicile of the child would, as indicated by Justice Jackson, tend to preserve our states as legal units as full faith and credit contemplated."

[33]*May* v. *Anderson* at page 1227 (97) *L ed*) *Note* 8. "The instant case does not present the special considerations that arise where a parent, with or without minor children, leaves a jurisdiction for the purpose of escaping process or otherwise evading jurisdiction, and we do not have here the considerations that arise when children are unlawfully or surreptitiously taken by one parent from the other." And at page 1230 (97 *L ed*) Justice Jackson noted the special consideration "in cases where the domicile is obviously a contrived one or the claim of it a sham."

interest of the child and society alike, a second court's jurisdiction must not be contrived. A parent, dissatisfied with a custody award may not schemingly seek a redetermination in the court of another state, for even without regard to any wrong done, "stability of environment . . . in itself is an important factor in the welfare of the child."[34]

The instant case presents bad faith of the leave-taking parent in great measure.[35] Indeed, extensive research gives us confidence to observe that this case is among the most extreme *bad faith cases* reported on this subject. The lower court's decision made little note of the mother's bad faith, and gave it no consequence. It is believed that such decision

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[34]*Stansbury, Custody and Maintenance Across State Lines,* 10 *Law Contem Prob* 819 *at* 829 N 76 (1944).

26 *R. Mt.* 205, 208 (1954) "This is the type of situation that the full faith and credit clause was created to prevent."

[35]While both parents and children were domiciled and physically present in California the mother's petition to remove the children to Michigan was denied (R 2-3, para. 6-7, *infra* 49 R 6, para. 6-7, *infra* 53). With admitted deceit (R T 141-142) she brought the children to Michigan "To prevent . . . the father . . . from exercising his right of visitation", of the children (R 6, para. 8, *infra* 53) because of her inability to obtain justice in the California court, and that her judgment "was superior to that of the judicial system of California" (R T 153). Her responsive pleading in the Michigan court alleged that the father had "practiced unnatural sexual activities with said children", (R 6, para. 8, *infra* 53) at times prior to her California petition for removal to Michigan. Although the custody litigation continued for over 6 years, she had never before made the claim to the father or any court (R T 46). The mother refused to make any proof of the charge, (R T 181-182). The trial court found no evidence to support the claim (R 55, *infra* 40).

thus conflicts with that *principle* referred to in *May* v. *Anderson, supra.*[36]

(c) Conflicts wth the Welfare of Children.

It is believed that the rule embraced by the lower court jeopardizes the welfare of countless children, by fostering the initial trouble. It beckons to all parents dissatisfied with prior custody adjudications. If consistent, the rule threatens to defeat itself by whispering to its own losing litigant to take leave with the children. It compounds the greatest evil of divorce—the instability of the children involved. While showing an unfortunate lack of confidence in the judicial determinations of a sister state,[37] the local court has less ability to provide for the best interests of the children. The parent-child relationship, first impaired by the divorce, is now reduced in half. Neither visitation (R T 162) nor support of the children can be regulated in the second court. Its available data, limited by recent abode, supplants the case-long experience of the prior court. The rule exaggerates the hardship of the children in returning to their place of birth and life-long environment. Without factual basis, the decision erroneously presumes the prior court's punitive motives. Moreover, the decision wrongfully infers the California court's callousness to consideration of the children's well-being. The decision omits to consider that upon the children's return to their original home, the prior court may yet modify its custody decree as their welfare may require.

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[36]97 *L ed at* 1230, Domicile contrived. Refer to bad faith generally, N 33, supra; *Williams* v. *N. Carolina,* 317 *US* 287, 87 *L ed* 279, 63 S Ct.207.

[37]*Goodrich, Conflict of Laws* (3 *ed*) 421, 423.

It is believed that the lower court's decision perpetuates a grevious wrong to the father and children in this case. Vast distance separates them. The children are reared in the shadow of fugitive existence and defiance of the law. It is believed that parental rights have been "cut off" contrary to the *principle* of the decision in *May* v *Anderson, supra.*

CONCLUSION

Full faith and credit is here sought of a foreign custody decree having unimpeachable jurisdictional foundation. Thus, the remaining question reserved from decision in the *Halvey* case is squarely presented. The wide conflict of state court decisions on the question now induces child abduction by parents who shop among those forums. The most precious rights of parent and child submit to the ultimate authority of self-help. The vast and increasing quantity of such migratory divorce problems urgently requires certainty in this law.

It is submitted that this petition for Writ of Certiorari should be granted to the end that this Nation way have one rule sound in legal logic, and a principle of order in a federal system that will withstand the pressures of time and litigation.

Respectfully submitted,
Douglas K. Reading,
Counsel for Petitioner,
305 Ann Arbor Trust Building,
Ann Arbor, Michigan

Dated December 22, 1955.

APPENDIX A

Constitutional, Statutory and Court Rule Provisions Cited and Quoted.

Article IV, Section 1, United States Constitution:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Title 28, United States Code Annotated 687:

> "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Title 28, United States Code Annotated, Section 1257:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

Michigan Court Rule 60, Sec. 1, Mich. CRA (Honigman) page 594:

> Sec. 1. Leave to appeal to the Supreme Court shall be required in the following cases:
>
> (a) Where such leavve is expressly required by statute or rule;

(b) Where the remedy of review, under statute, or, in the absence of statute, under common law, is by certiorari, mandamus or other discretionary writ; or case made unless the controversy involves more than $500;

(c) Where a delayed appeal is sought;

(d) Where, in an action at law submitted on the facts to court or jury, a judgment is rendered for the defendant, unless the trial judge shall certify that the controversy involves more than $500;

(e) From the appointment of a receiver pendente lite.

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

1. Preliminary opinion delivered in the trial court in the course of the trial April 10, 1054.

Petitioner, Richard Franklin Bird, has filed his petition for writ of habeas corpus for Richard Nixon Bird, born September 23, 1938; Ellen Anne Bird, born September 21, 1941, and Mary Elizabeth Bird, born July 16, 1943, who the the three children of petitioner and respondent, his former wife, Sarah Ellen Bird, to whom a divorce was granted in a judgment of the Superior Court for the County of Los Angeles, State of California, dated December 16, 1946, wherein custody of said children was awarded to respondent "with the right of reasonable visitation on the part of the defendant,' and the removal of said children

by respondent from the State of California for a period of over 90 days was prohibited without her first obtaining the court's permission to remove the children permanently to Michigan. This petition was denied by order dated August 6, 1950, which also granted certain additional visitation privileges to petitioner herein. Respondent remained with the children in California until sometime in the spring of 1951 when she sold the California home, with petitioner's knowledge, stored the furniture and without the California court's written consent, left with the children for Michigan on May 1, 1951, petitioner having accompanied them to the railway station. Petitioner testified he believed she "was coming back" as she had done in 1949.

Thereafter petitioner filed a petition in the California court and, after an appearance on behalf of respondent, filed by her attorneys, an order was entered on October 25, 1951, granting custody to petitioner and ordering "for the best interest of said minor children, and each of them, that they be returned to the State of California."

Petitioner and said children remained in the State of Michigan.

Respondent's answer to the petition herein sets up and offers to prove that petitioner is a sexual pervert. On the hearing she offered testimony concerning claimed acts of perversion on the part of petitioner with one or more of said children prior to October 25, 1951, the date of the California order granting custody to petitioner herein, to the admission of which testimony petitioner objected on the ground that all matters prior to said order became

merged therein, and, therefore, *res adjudicate.* The petitioner also reserved the right to cross examine respondent whose direct examination was in progress at the time of the proffered testimony.

On the question of the admissibility of the proffered testimony the court now holds that such testimony is unnecessary to decision nor is the cross examination of respondent who had testified as part of respondent's case after petitioner had rested. The court is prepared to decide this matter solely on the basis of petitioner's showing. The evidence is uncontroverted that *petitioner knew respondent had sold her California home,* stored the furniture and left for Michigan on May 1, 1951, and had not returned to California within 90 days thereafter, had obtained an order for the children's custody in him from the California court on October 25, 1951, had visited Michigan during March, 1952, and had seen the children and knew they were established with the mother in a home and in school in Michigan, that he waited for eleven months, from October 25, 1951, until September 30, 1952, before making any substantial move to obtain relief in Michigan courts. He apparently felt that the children were satisfactorily and properly housed, clothed, schooled and controlled in the home and environment established by the mother in Michigan because he did not show on the record any objection to any of the conditions of life of the children. He paid no money for their support from about November 1, 1951. Therefore, since he had visited the children in Michigan in March, 1952, and kenw their circumstances, he must have been of the opinion that they were not suffering the want either of the necessities of life or of proper guidance. Had he found anything unsatisfactory, certainly, inasmuch as he is

a public defender for the county of Los Angeles, California, earning, according to his testimony, $842.00 per month, it may be presumed he would have taken immediate steps to bring such to Michigan court's attention or to have made funds available to have furnished his children what he considered necessary.

From the foregoing, therefore, the court finds: (1) that there is no evidence whatsoever that the respondent has not properly cared for and furnished a good home and environment for the children in Michigan, and (2) that a substantial and material change in circumstances took place over six months after the California court's order denying respondent's petition for permission to move to Michigan, viz, the sale by respondent, *apparently* with petitioner's knowledge and acquiescence if not active co-operation, of the California home in which the respondent and the children had lived for some years. This court is not unmindful that, apparently, the California court did not base its order transferring custody to petitioner on any evidence as to conditions and circumstances of the children's home and life in Michigan, but rather was moved principally by respondent's disobedience of its prior order.

Petitioner, by waiting over eleven months permitted the children to become established in the Michigan home and schools, thus permitted a change of condition which now compels this court to hold (1) that the children should not be uprooted from their present established home, and especially should not be dislocated in their school life during the school year.

The court has carefully considered the extensive briefs of the parties and especially the claim of petitioner that full faith and credit must be accorded by the Michigan court to the order of October 25, 1951, of the California court.

The true Michigan rule appears to be that stated in *Ex Parte Peddicord,* 269 Mich. 142, 145:

> "In a case involving the custody of a child, where different conditions have arisen subsequent to the order or decree of a court in another state, the local court will be guided in its decision by what appears best for the welfare and interest of the child. *In re Stockman,* 71 Mich. 180; *In re Leu* (240 Mich. 240) . . .; *In re Volk,* 254 Mich. 25."

In the *Peddicord* case, supra, the custody had been granted to the mother by the Indiana court in a decree which permitted the child's removal from the state for a period "not to exceed 30 days." In the instant case the respondent had been granted custody and permitted to remove the children from California for not to exceed 90 days. Thus, on these facts, the two cases are very similar and the decision in the *Peddicord* case is controlling herein.

Petitioner urges that custody has been taken from the mother and given to the father in the order of October 25, 1951, and that the mother's disobedience of the prior order should militate against her in this court. Here again it should be noted that before the mother left California the change of circumstance, created by the sale of the house, had taken place. Furthermore, the order for the change of

custody to petitioner was not entered until the mother had already acquired a Michigan domicile. Petitioner argues that the respondent did *not* have unrestricted custody under the terms of the decree because of the prohibition as to the removal of the children from California. This court cannot agree. The domicile of an infant until emancipated is that of the father. When, in a divorce decree, custody is awarded to *one* parent, and not to the parents jointly, the domicile of that parent becomes the domicile of the infant, "Restricted Custody" would occur where custody is in *both* parents in whole or in part. When custody is in one person it is unrestricted. Mere right of visitation in the father did not amount to custody in the father. Nor did the decretal prohibition against the removal of the children from California for more than 90 days without the court's written consent oust the custody from or restrict the status of the custody in the mother as granted by the decree.

This reasoning is sustained in the *Peddicord* case, supra, where the decretal prohibition against the mother removing the child from Indiana for longer than 30 days did not operate to divest the mother of custody.

> "When a divorce has been granted to the wife, however, and unrestricted custody of the minor child of the marriage given her in the decree, her own domicile, and not the father's, establishes that of the child." 9 *R.C.L.* p. 549 Quoted in *In re Volk*, 254 Mich. 25, 32.

Here the mother established a Michigan domicile and the domicile of the children followed that of the mother, —

all of this occurring before the California court's order of October 25, 1951, changing custody to the father. Thereafter the order made by the California court in no way affected the children's status "and does not constitute a judgment which must be given full faith and credit under the provision in the Federal Constitution." *In re Volk*, 254 Mich. 25, 32.

As stated in *In re Volk*, supra:

> "Nor is a decree of a court of one state awarding the custody of a child binding upon the courts of another state under the full faith and credit clause of the Federal Constitution after the child had become domiciled in the latter State. Such a decree as to a child has no extra-territorial effect beyond the boundaries of the State where it is rendered, and the courts of the second State willnot remand the child to the jurisdiction of another State, especially where it is against the true interests of the child. The reason for this rule is found in the fact that children are the wards of the court and the parents. Therefore, when a child changes his domicile and becomes a citizen of a second State, he is no longer subject to the control of the first State."

Inasmuch as the California court's order changing custody to the father primarily was for the purpose of punishing the mother's disobedience the following statement by Professor Albert A. Ehrenzweig in an article entitled "Interstate Recognition of Custody Decrees" in 51 *Michigan Law Review*, p. 345, 373 is in point:

> "Rather, while clearly feeling free at any time in the child's interest to change custody or to refuse to enforce a foreign decree, most courts will refrain from such action in certain typical situations, in which the change or non-enforcement of a foreign decree would benefit a parent with "unclean hands." This practice (here referred to as the "Washington rul") dos not extend, however, to the recognition or enforcement of the decree of a foreign court modifying its previous award merely or primarily *for the purpose of punishing disobedience.*" (Emphasis added)

The writ should be denied.

However, in view of the fact that the proofs were not closed and petitioner is entitled to cross examine respondent, either may apply to the court by April 28, 1954, for the setting of trial date to complete the proofs (either for said cross examination or for a ruling on the proffered testimony) for the purpose of completing the record in case of an appeal. In default of such application an order denying the writ may be presented April 29, 1954.
Dated: Ann Arbor, Michigan.

April 10th, 1954.

James R. Breakey, Jr.
Circuit Judge.

2. Final Opinion Delivered in the trial court—January 4, 1955

THE COURT: The Court heretofore has filed a written Opinion covering his Opinion on the showing made by the Petitioner for this Writ of Rabeas Corpus. As the Court reterated during the adjourned proceedings last week, the Court's Opinion was based solely on the testimony of the Petitioner, and was not based at all on any of the testimony adduced in favor of the Respondent.

At the opening of the proceedings on December 31st, which were, in effect, a proceedings on the adjourned trial date, the Respondent's attorney moved to strike the testimony of the Respondent. The objection to the granting of the motion was made by the Petitioner's attorney. The Court granted the motion.

A situation was presented to the Court in this case which the Court felt warranted the making of a separate record. This was done. The separate record consists of the testimony of the Respondent on direct-examination, the testimony of the Respondent on cross-examination, and certainly, rebuttal testimony by the Petitioner.

The Opinion which the Court is now dictating is solely directed to and constitutes a finding on the separate record.

The Court is convinced that under all the circumstances shown in this case, it is for the best interests of the three children—Richard, Ellen and Mary, that they remain in the State of Michigan. The reasons for that finding are:

First, it appears that there has been established in Michigan, a permanent home by the mother, who has bought and completely paid for the residence on Prospect Street or at least, in the City of Ann Arbor; that the mother is regularly employed in the Wayne, Michigan City School System, as a teacher of the fifth grade at Monroe School, receiving $198.00 each two weeks—that is, twice monthly, and that the children were examined by the Court in a private interview in Chambers—at which Counsel for each of the parties was present, as well as Mrs. Leason from the Office of the Friend of this Court. The children appeared before the Court in these interviews separately, and the transcript by the Reported of this Court of the questions and answers and the colloquy taking place in Chambers is here, and will be available to the parties on their ordering and paying for the same. The children in each instance appear well—very well adjusted, happy, contented, and individually and with some emphasis, stated to the Court that they liked to live in Michigan—the two girls especially, saying that they preferred Michigan because it had snow. The Court asked each of the children separately as to which State the children would prefer living in—California or Michigan—were the opportunity afforded to them to live in either State with their mother, and they indicated they preferred Michigan. The reports of the children's school activities shiw that the children are enjoying their school and making very good progress, and Ellen, for instance, is doing sufficiently good work so that she is on a scholarship at the University High School in the eighth grade. Richard is working and having some odd jobs that he does for four or five of the neighbors. He works at the cafeteria so that he earns his lunch or is given his lunch at school—and each of the children

appear to have some savings. Richard has about three hundred dollars and the other two, about fifty dollars apiece. The children—that is, the two girls—are in receipt of an allowance of a dollar every two weeks from their mother.

It is now over three years since the children left the State of California, and since they have established their home in Michigan. This alone is a strong reason for them to remain in Michigan, especially inasmuch as the mother seems to be controlling them well and developing them in their school and after-curricular activities, and is able to care for them without funds having been advanced in any substantial nature, at least, by the father since the entry of the order of October 21st, 1951.

The children, in other words, are receiving excellent care, and are developing in a way that the Court thinks is satisfactory, and there is nothing on this record in the least that appears to indicate any disadvantage to the children of living in Michigan, other than might arise from the fact that they do not see their father. The Court could not, on this record—and the Court is speaking of the separate record—order them to be returned to California with any reasonable hope that the children would go willingly or that they would be placed in California without their mother and continue the progress that is apparent under the present surroundings. In other words, the mother is doing a good job in caring for the children.

The problem of their not being visited by the father—in other words, their being away from the State of California, where their father has a responsible position,

weighs, of course, and must be considered against the evident well-being of the children. The Court considers that he must accord greater weight to the apparent present well-being of the children after the change of circumstances, which has taken place since the children left California, and especially since the entry of the order of October 21st, 1951, in the California Court.

MR. BIRD:: (Interrupting) Pardon me, Your Honor. That date is wrong. It was October 25th, and when I spoke, I thought you were a year and four day s off. I am sorry.

MR. READING: It was October 25th, 1951.

THE COURT: All right—then the record may be corrected.

This is not a case where the Court can lightly either condone a violation of this order of another state, or appear to further such purposes, and the Court does not do it; but it was some eleven months after the children had left the State of California before the end of their school year, when they were brought to Michigan, and there was a shift-over of a rather definite nature that took place then. And the Court has considered that in his first Opinion and does not now consider that background, but on the testimony on the separate record, the Court is of the opinion that there has been shown nothing to cause the Court to change his original opinion—and, in fact, everything that has been shown, confirms to the Court that this original opinion was correct and that the children's best interests will be served by remaining in Michi-

gan—and, therefore, the Writ is denied. The Court will state also as an additional statement that there has been no evidence of any of the perversion indicated in the allegations.

MR. READING: Another thing I believe the Court stated that there was no lack of diligence on the part of the Petitioner in bringing this action or in prosecuting it.

THE COURT: I would phrase it differently. The Court said that the Court was not charging the Petitioner with—or finding the Petitioner guilty of—any laches in making the statement that eleven months had intervened between the date of the children's leaving California and —between the date of the filing of the order of October 25th, 1951, and the commencement of the proceedings for the Application for the Writ of Habeas Corpus in this Court. The Court is not finding that and is not charging that that amounted to laches. And I think it isn't for the Court to pass upon diligence, because there is no charge of lack of diligence. That is not an issue in the case, and I made that statement to you in explanation of that paragraph or two paragraphs in the Court's Opinion which sys—due to the length of time that elapsed. It is merely to show that the Court was not charging negligence—not charging lack of diligence in the filing of the Application for a Writ of Habeas Corpus, but rather was inferring that the conditions of the children in Michigan were satisfactory as far as their welfare was concerned, and the separate record confirms the Court in the inference that the Court said was raised in his original Opinion.

The Writ is denied.

State of Michigan,
County of Washtenaw—SS

I, MARGARET C. HUTZEL, hereby certify that I reported the Cause entitled, "In the Matter of the Application for a Writ of Habeas Corpus for Richard Nixon Bird, Ellen Anne Bird and Mary Elizabeth Bird, Minors" before the Honorable James R. Breakey, Jr., Circuit Judge, at Ann Arbor, Michigan, and that the above and foregoing is a true and correct transcript of the Opinion of the Court on Tuesday afternoon, January 4th, 1955, in said Cause.

s/ MARGARET C. HUTZEL
Official Court Reporter
22nd Judicial Circuit

3. Judgment of trial court—January 6, 1955.

At a session of said court held at the court house in the city of Ann Arbor in said county on the 6th day of January, AD. 1955;

PRESENT: HONORABLE JAMES R. BREAKEY, JR., Circuit Judge.

A petition for writ of habeas corpus filed by Richard Franklin Bird having come on to be heard, the court, after hearing testimony in regard thereof and arguments of the

attorneys for the respective parties, is of the opinion that the writ should be denied;

NOW THEREFORE, it is ordered that the petition for writ of habeas corpus be and the same is hereby denied.

s/ James R. Breakey, Jr.
Circuit Judge

Approved:

s/ Burke, Burke & Ran
Burke, Murke & Ryan
Attorneys for Sarah Ellen Bird,
Respondent

s/ Douglas K. Reading
Douglas K. Reading
Attorney for Petitioner,
Richard Franklin Bird

4. Supreme Court of the State of Michigan Order Denying Application for Leave to Appeal—October 11, 1955.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eleventh day of October in the year of our Lord one thousand nine hundred and fifty-five.

Present the Honorable

EMERSON R. BOYLES
Chief Justice
HENRY M. BUTZEL,
TALBOT SMITH,
EDWARD M. SHARPE,
EMERSON R. BOYLES,
NEIL E. REID,
JOHN R. DETHMERS,
HARRY F. KELLY,
Associate Justices.

In the Matter of
Richard Nixon Bird, et al.
46671½

In this cause an application is filed by appellant for leave to appeal in the nature of certiorari from an order of the Circuit Court for the County of Washtenaw, and a brief in opposition thereto having been filed and due consideration thereof having been had by the Court. It is ordered that the application be and the same is hereby DENIED.

STATE OF MICHIGAN—ss.

I, HUGH H. CARPENTER, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true manuscript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 12th day of October in the year of our Lord one thousand nine hundred and fifty-five.

HUGH H. CARPENTER,
Clerk

SEAL

APPENDIX C

Copy Order Superior Court, State of California, County of Los Angeles —

BUSH & HOFFMAN
206 South Spring Street
Los Angeles, 12, California
MAdison 66843

ORDER MODIFYING PREVIOUS COURT ORDER AS TO CUSTODY AND SUPPORT OF MINOR CHILDREN AND ALIMONY OF PLAINTIFF

(Filed—October 25, 1951)

This cause having come on regularly for hearing in the above entitled Court, in Department B., in Pasadena, on the 3rd day of August, 1951, at 2 o'clock p.m., on motion of Bush & Hoffman, Attorneys for defendant, that the order now in effect requiring defendant to pay to plaintiff $225.00 per month as and for the support of plaintiff and 3 minor children of the parties hereto, be vacated; and upon the further motion that orders now in effect giving the custody of the 3 minor children to the plaintiff, be modified, giving the sole care, custody and control of the 3 said minor children to the defendant; Guy F. Bush, of the firm of Bush & Hoffman, appearing for the moving party, defendant herein, and Harvy M. Parker of the firm of Rinehart, Merriam, Parker & Berg, appearing for plaintiff, Sarah Ellen Bird; and the matter having been continued to October 19th, 1951, for hearing; and Court being fully advised in the premises;

The Court makes its findings and order as follows:
The Court finds:

That by the terms of the Interlocutory Decree of Divorce herein entered December 16, 1946, the defendant was ordered to pay to plaintiff as for her support and the support of the 3 minor children of the parties hereto, the sum of $225.00 per month.

That said decree further stated that plaintiff have the sole care, custody and control of the 3 minor children of the parties hereto with the right of reasonable visitation by defendant and provided that plaintiff should not remove said children from the state of California permanently.

The Court further finds that on or about the 1st day of May, 1951, plaintiff removed said children from the state of California to the state of Michigan, and that she does now refuse to return the said children, or any of them, to the state of California, and that they now reside with the plaintiff in the City of Dexter, Michigan.

The Court further finds that said 3 minor children are kept out of the State of California by the plaintiff for more than 90 days without permission of the Court, and without the consent of the defendant herein.

The Court further finds from the record, file and affidavits and previous hearing before it that it is for the best interest of said minor children, and each of them, that they be returned to the state of California, and that defendant be given the sole care, custody and control of said minor children.

Wherefore it is ordered:

1. That defendant have the sole care, custody and control of said 3 minor children of the parties hereto, Richard Nixon Bird, a son, born September 23, 1938; Ellen Anne, a daughter, born September 21, 1941; and Mary Elizabeth Bird, a daughter, born July 16, 1943; with right of reasonable visitation on the part of plaintiff.

2. That the order heretofore made herein, requiring defendant to pay to plaintiff as and for her support, and as and for the support of the 3 minor children of the parties here to, the sum of $225.00 per month be hereby discontinued until further order of the Court.
Dated: October 25th, 1951

Kurtz Kauffman
Judge of the Superior Court

APPENDIX D

PETITION FOR WRIT OF HABEAS CORPUS WRIT ISSUED

(Filed—September 30, 1952)

Your Petitioner, Richard Franklin Bird, respectfully represents unto this Honorable Court as follows:

1. That your Petitioner is the father of the minor children, Richard Nixon Bird, born September 23, 1938; Ellen Anne Bird, born September 21, 1941, and Mary Elizabeth Bird, born July 16, 1943.

2. That the said minor children are now being held and restrained of their liberty by Sarah Ellen Bird, mother of said children, at 6175 Daly Road in the Township of Webster, County of Washtenaw and State of Michigan, for no lawful cause or reason whatsoever, and contrary to and in violation of a certain valid order of a court of competent jurisdiction as hereinafter stated. That the said minor children are not committed or detained by virtue of any process, judgment, decree or execution specified in

Section 8 of the Habeas Corpus Act, being M.S.A. 27.2251, and that such confinement is not by virtue of any warrant, order or process whatever.

3. That your Petitioner and the said Sarah Ellen Bird were duly and legally married on the 7th day of October, 1937, and that in February, 1939, did establish and maintain their domicile in the City of Pasadena, County of Los Angeles in the State of California, and that all of the said children were born in said City, and at all times have been domiciled in the City of Pasadena, County of Los Angeles in the State of California.

4. That your Petitioner and the said Ellen Bird were divorced by a valid judgment entered in the Superior Court of the State of California, in and for the County of Los Angeles, on the 16th day of December, 1946, in the cause of Sarah Ellen Bird, Plaintiff, vs. Richard Franklin Bird, Defendant, Cause No. D 307094, the said parties having personally appeared in said cause, and the said parties and said minor children being physically present in the said County of Los Angeles and State of California, and subject to the jurisdiction of said Superior Court.

5. That by the terms of said judgment the care, custody and control of said minor children was awarded to the said Sarah Ellen Bird, with the right of reasonable visitation on the part of your petitioner, and with the further express provision therein stated that the said Sarah Ellen Bird shall not remove any of the said children from the State of California for a period of over ninety days without first obtaining approval of the Court or the written consent of your Petitioner for any such removal.

6. That on the 18th day of July, 1950, the said Sarah Ellen Bird petitioned the said Superior Court and pursuant thereto, an order was entered in said cause requiring Petitioner to show cause why said judgment should not be modified to, among other things, permit the said Sarah Ellen Bird to remove the said children permanently to the State of Michigan and establish her home there.

7. That your Petitioner did thereupon file in said cause his petition to modify said judgment to provide further and greater rights of visitation of said children, and that hearing was held upon both said petitions and order to show cause, and on the 8th day of August, 1950, a valid order was duly and legally entered in said cause in said Superior Court denying the Petition of Sarah Ellen Bird, excepting that your Petitioner was therein ordered to pay certain counsel fees to the attorney of Sarah Ellen Bird, which your Petitioner did thereupon pay as ordered, and said order did further provide that said judgment be modified to provide that your Petitioner have the said children in his possession for a period of four hours on each first, third and fifth Sunday afternoons of each month, commencing July 30, 1950, and each of said children for a period of four weeks during summer vacation each year, and all other provisions of said judgment remained unmodified and in full force and effect. That throughout the course of said proceedings, the said parties and each said minor child were domiciled in, and physically present within the State of California, and subject to the jurisdiction of said Superior Court.

8. That on the 1st day of May, 1951, the said Sarah Ellen Bird did leave the State of California and did remove

said minor children to the State of Michigan and County of Washtenaw on the false and fraudulent pretense that such removal was for a temporary visit, and that said children would be returned to the City of Pasadena, County of Los Angeles and State of California within a period of ninety days, as required by the express provisions of said judgment.

9. That contrary to and in violation of the terms of said judgment, and without first obtaining approval of the court or the written consent of Petitioner for such removal, the said Sarah Ellen Bird has since remained and kept said children in the County of Washtenaw, State of Michigan.

10. That on the 25th day of October, 1951, there was duly and legally entered in said cause in the said Superior Court, having jurisdiction of the parties and said minor children, a valid order modifying the said judgment, and awarding unto your petitioner the sole care, custody and control of the said three minor children.

11. That your Petitioner has fully and faithfully abided and fulfilled all duties and obligations as provided by said judgment and modifications thereof.

12. That your Petitioner is a fit and proper person to have the care, custody and control of said minor children, and is well able to provide them a proper home, and to supply their needs, and that it is for the best interest and welfare of said minor children that your Petitioner have their care, custody and control, and that said children ought and should be delivered into the custody of your Petitioner.

13. That your Petitioner verily believes that the said imprisonment is illegal, and that the illegality thereof consists in that the said Richard Nixon Bird, Ellen Anne Bird and Mary Elizabeth Bird are not detained by lawful process and are not held for any crime or offense against the laws of the State of Michigan or against or upon any of the citizens or inhabitants thereof, and that your Petitioner is the father of said children and is lawfully entitled to their custody by virtue of a valid order of a court of competent jurisdiction to which this Honorable Court should give full faith and credit under the laws of this State and of the United States of America.

WHEREFORE, your Petitioner prays that a writ of habeas corpus may be issued to inquire into the cause of imprisonment and detention of the said Richard Nixon Bird, Ellen Anne Bird and Mary Elizabeth Bird, and that they, and each of them, may be relieved therefrom, and that the said Sarah Ellen Bird be ordered to turn over to and surrender to your Petitioner forthwith, the said Richard Nixon Bird, Ellen Anne Bird and Mary Elizabeth Bird.

s/ Richard Franklin Bird
Petitioner

State of Michigan,
County of Washtenaw—SS

Subscribed and sworn to before me, a notary public in and for said county, this 30th day of September, 1952.

s/ Gladys M. Brown
Notary Public
Washtenaw County, Michigan

My Commission Expires Sept. 6, 1953

s/ Douglas K. Reading, Atty. for Petitioner
305 Ann Arbor Trust Bldg., Ann Arbor, Mich.

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

(Filed—October 13, 1952)

Now comes the Respondent, Sarah Ellen Bird, and for answer to the Petition for a Writ of Habeas Corpus says as follows:

1. Answering Paragraph 1, Respondent admits the allegations therein contained.

2. Answering Paragraph 2, the respondent denies that the children are being restrained of their liberay. Further answering said paragraph, the Respondent admits that there has been an order of a California Court pertaining to the custody of said children, but avers that this Honorable Court has jurisdiction to determine the rights of the

parties without reference to said order, being guided by what appears to be in the best interests of said children. Further answering said Paragraph, Respondent admits that said children are not committed or detained by virtue of any process, judgment, decree or execution.

3. Answering Paragraph 3, Respondent admits the allegations therein contained.

4. Answering Paragraph 4, Respondent admits the allegations therein contained.

5. Answering Paragraph 5, Respondent admits the allegations therein contained.

6. Answering Paragraph 6, Respondent admits the allegations therein contained.

7. Answering Paragraph 7, Respondent admits the allegations therein contained.

8. Answering Paragraph 8, the Respondent admits that she removed the children from the State of California on the date claimed, but denies that such removal was done on any fraudulent pretense, and avers that the reason for such removal of residence was to prevent the Petitioner, father of said children, from exercising his right of visitation with them; that on the occasion of such visitations and even prior to the separation of the parties during the pendency of the suit for divorce in the California Court, the Petitioner practiced unnatural sexual activities with said children, and that such activities had a very deleterious emotional effect upon said children.

9. Answering Paragraph 9, the Respondent admits the allegations therein contained, and avers that her attempts in the California Court to bring the court's attention to the situation and the activities of the Petitioner with respect to said children were prevented for the reason that the Petitioner was a member of the California Bar. Further answering said Paragraph, the Respondent avers that she has kept the children in the State of Michigan, and away from the Petitioner, because she fears for their safety if the Petitioner is allowed to exercise his rights of visitation.

10. Answering Paragraph 10, Respondent has no knowledge concerning the allegations therein contained, and therefore, neither admits nor denies the same but leaves the Petitioner to his proofs thereof. Further answering said Paragraph, the Respondent avers that it was impossible for her to return to California for the hearing on the Petition to modify theDecree.

11. Answering Paragraph 11, the Defendant denies the allegations therein contained and avers that the Petitioner has in no way provided for the children financially or otherwise since October, 1951.

12. Answering Paragraph 12, the Respondent denies that the Petitioner is a fit and proper person to have the custody of said children, and denies each and every other allegation therein contained, and avers to the contrary that the perverted sexual activities of the Petitioner render him an unfit person to associate with said children at any time.

13. Answering Paragraph 13, the Respondent denies that said children are in prison or their presence and residence with the Respondent in the State of Michigan is illegal. Further answering said Paragraph, the Rsspondent admits that the children are not detained by lawful process or process of any kind, and that they are present and residing in the State of Michigan of their own volition and expressed desire. Further answering said Paragraph, the Respondent admits that the Petitioner is the father of said children, but denies that he is lawfully entitled to their custody, and denies that the order of the California court, if its exists, should be given full faith and credit by this court.

WHEREFORE, your Respondent denies that the Petitioner is entitled to any of the relief prayed in said Petition.

s/ Sarah Ellen Bird
SARAH ELLEN BIRD, Respondent

State of Michigan,
County of Washtenaw—SS

On this 10th day of October, A.D. 1952, before me, a Notary Public in and for said county, personally appeared Sarah Ellen Bird, who being first duly sworn, deposes and says that she has read the foregoing Answer by her subscribed; that she knows the contents thereof and that the same is true of her own knowledge, except as to the matters

therein stated to be upon information and belief, and as to those matters she believes it to be true.

s/ Alta M. Grastic
Notary Public, Washtenaw Co., Mich.
My Commission expires Nov. 7, 1954.

BURKE, BURKE & SMITH /s
Burke, Burke and Smith
Attorneys for Respondent
215 Ann Arbor Trust Bldg.
Ann Arbor, Michigan.

REPLY

(Filed—November 24, 1952)

NOW COMES Petitioner, Richard Franklin Bird, and for reply to the Answer to Petition for Writ of Habeas Corpus herein says as follows:

1. Replying to Paragraph 2 thereof, denies that this Honorable Court has jurisdiction to determine the rights of the parties without reference to said order of the California court.

2. Replying to paragraph 8 thereof, denied that he, at any time practiced any sex activities with said children.

3. Replying to Paragraph 9 thereof, denies that respondent was ever prevented in her attempts in the California court to bring the Court's attention to the situation

and the activities of the Petitioner with the said children for the reason that Petitioner was a member of the California Bar, or any reason whatever, and denies that Respondent ever made such attempt, and denies that Respondent has kept the children in the State of Michigan because she fears for their safety if Petitioner is allowed his rights of visitation.

4. Replying to Paragraph 10 thereof, upon information and belief denies that it was impossible for her to return to California for hearing on said Petition, and Petitioner avers that Respondent was represented at such hearing by Harvey M. Parker of the firm of Rinehart, Merriam, Parker and Berg, her attorney of record in such proceeding.

5. Replying to Paragraph 12 thereof, denies that he has committed any sex activities whatever that renders him an unfit person to associate with said children.

s/ Richard F. Bird
RICHARD RANKLIN BIRD

(Jurat)